No. 96-890

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Supreme Court, U.S.
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In The

Supreme Court of the United States

October Term, 1996

BETTY-LOUISE FELTON, *et al.*,

Cross-Petitioners,

vs.

RACHEL AGOSTINI, *et al.*,

Cross-Respondents,

-and-

CHANCELLOR OF THE BOARD OF EDUCATION OF THE CITY OF NEW YORK, *et al.*,

Cross-Respondents.

On Cross-Petition for a Writ of Certiorari to the United States Court of Appeals for the Second Circuit

REPLY BRIEF IN SUPPORT OF CROSS-PETITION FOR A WRIT OF CERTIORARI

STANLEY GELLER
Counsel of Record
Attorney for Cross-Petitioners
750 Lexington Avenue
21st Floor
New York, New York 10022
(212) 486-4590

9981

(800) 3 APPEAL • (800) 5 APPEAL • (800) BRIEF 21

Lutz Appellate Services, Inc.

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In their briefs in opposition to the cross-petition and also in their reply briefs in support of their own petitions, in both of which petitioners see fit to address the issues raised in the cross-petition, petitioners, aided by the defendant Secretary, United States Department of Education, make a protean effort to obfuscate the serious threshold procedural question posed in the cross-petition.

That question is whether, 11, or perhaps it will be 12, years after having lost an appeal in this Court, petitioners may, on the same record, have a rehearing of their appeal in the guise of a motion for relief from a judgment under Rule 60(b) of the Federal Rules of Civil Procedure, for which that Rule was never intended and has never been invoked.

FURTHER REASONS FOR GRANTING THE CROSS-PETITION

I.

RAISING THE PROCEDURAL QUESTION BY CROSS-PETITION IS NECESSARY AND PROPER.

The claim of petitioners and the Secretary that the cross-petition is allegedly unnecessary or improper is based on the false premise that cross-petitioners appear in this Court as the "prevailing" parties rather than as "aggrieved" parties, and as such may, or should, have raised the procedural question in their brief in opposition to the petitions. Any such premise disregards the history of these proceedings and the posture of the proceedings in this Court.

There were at most two issues considered and decided by the courts below: (1) whether the Rule 60(b) motions were procedurally proper, and (2) whether the courts below had the power to grant relief from an outstanding judgment that was

entered pursuant to the mandate of this Court. (It bears noting that the courts below at no point addressed themselves to the sole question posed in the petitions — i.e., whether *Aguilar v. Felton*, 473 U.S. 402 (1985) should be overruled.)

The second of the aforementioned issues was actually a "non-issue." There never was any real doubt in the minds of any of the parties that the courts below lacked the power to overrule an outstanding determination of this Court. The lead defendant in this case, the Secretary, established that point beyond any reasonable doubt when he explained to the District Court why he was not joining in the Rule 60(b) motions. The District Court in turn gave that "non-issue" short shrift in its decision and order in which the District Court devoted virtually all of its comments to the only real issue, that concerning whether the motions were "procedurally firm."

In any event, as far as petitioners are concerned, the "non-issue" concerning whether the courts below had the power to overrule an outstanding determination of this Court has disappeared now that the parties are before this Court, which undoubtedly has the power to overrule one of its prior determinations. At this stage of the proceedings, therefore, there is only one issue considered and decided by the courts below — that concerning whether the Rule 60(b) motions are procedurally proper — which may be said to be viable. On that issue, cross-petitioners lost in the District Court, cross-appealed in the Court of Appeals (without any claim on petitioners' part that we lacked the right to cross-appeal), and lost in the Court of Appeals.

In short, cross-petitioners appear before this Court, not as the "prevailing" parties, but as the sole "aggrieved" parties on the one issue considered and decided by the courts below that remains viable in this Court. It was incumbent on us, therefore, in order to press our case in this Court to file a petition for a writ of certiorari.

A comment made in the cross-petition will help to enforce the foregoing analysis. If the "non-issue" concerning whether the courts below had the power to overrule an outstanding determination of this Court were to be considered the issue on which cross-petitioners were the "prevailing" parties in the courts below, and if that issue continues to be the one on which petitioners seek redress as the "aggrieved" parties in this Court, these proceedings would be at an end for that reason alone. There can be no question that the courts below were correct in their decision on that issue, and that their decision should be affirmed.

In light of the foregoing, all of the cases cited by petitioners and the Secretary are inapposite which hold that the cross-petition is allegedly unnecessary or improper because cross-petitioners allegedly appear before this Court as the "prevailing" parties entitled as such to have raised in our brief in opposition to our adversaries' petitions any issue briefed, considered or decided in the courts below.

Additionally, it should be noted that the position taken by the Agostini petitioners and the Secretary, as opposed to that taken by the City petitioners, that the cross-petition is allegedly unnecessary, does not mean that it is improper. What the Agostini petitioners and the Secretary argue, in effect, is that cross-petitioners should have relied on the proposition that a cross-petition is allegedly unnecessary to raise what we believe to be the serious threshold procedural question presented in these proceedings concerning petitioners' misuse of Rule 60(b) and that we should have raised that question in our brief in opposition to their petitions. Cross-petitioners submit that we would have been foolhardy to have taken that risk and to have been faced with a potential claim in petitioners' reply briefs, to which we would not have been entitled to respond, that we had improperly raised a question we were required to have preserved in a cross-petition!

Such a risk would have been even greater had we relied on the Secretary's proposition that the question of petitioners' misuse of Rule 60(b) is "fairly included" in the question presented in the petitions concerning whether this Court should overrule its determination in *Aguilar.*

With respect to the position taken by the City petitioners to the effect that the cross-petition is allegedly improper because cross-petitioners are allegedly not "aggrieved" parties, cross-petitioners have noted above that we are in fact aggrieved parties on the only issue considered and decided by the courts below that remains viable in this Court. Assuming, however, that we are "prevailing" parties because of the denial of the Rule 60(b) motions by the courts below on the basis of their lack of power to overrule an outstanding determination of this Court, there is good authority that we are still sufficiently "aggrieved" by the adverse holding of the courts below that the motions are "procedurally firm" to be entitled to file a cross-petition addressing that adverse holding. *Deposit Guaranty Nat. Bank v. Roper,* 445 U.S. 326, 334-35 (1980); *Electrical Fittings Corp. v. Thomas & Betts Co.,* 307 U.S. 241 (1939).

There remains the argument of the Agostini petitioners that the serious threshold procedural question presented by the cross-petition is allegedly "insubstantial." This argument ignores the fact that the District Court devoted virtually all of its opinion to that question, the Secretary devoted a good portion of his initial brief in support of the petitions to the same question, and the Agostini petitioners themselves devote one of the three points in their reply brief in support of their petition to the question.

The alleged basis for the claim of "insubstantiality" is the provision in Rule 60(b)(6) which authorizes the granting of relief from a judgment "for any other reason justifying relief from the operation of the judgment." (The Agostini petitioners omit the

word "other" which makes it appear as if the preceding clauses of Rule 60(b) serve no purpose.) Cross-petitioners respectfully submit that any such construction of Rule 60(b)(6) would make a shambles of the doctrine of *stare decisis* and the Federal Rules of Appellate Procedure.

II.

PETITIONERS AND THE SECRETARY CITE NO CASE AND MAKE NO ARGUMENT THAT JUSTIFIES PETITIONERS' EGREGIOUS MISUSE OF RULE 60(b).

In their briefs in opposition to the cross-petition, petitioners cite no case that in any way sanctions the procedure they have followed in these proceedings in which, it bears repeating, they have used Rule 60(b) to apply for a rehearing of an appeal they lost 11 or 12 years ago on the basis of the original record on appeal. Cross-petitioners submit that the doctrine, advanced by petitioners, that enables a District Court, sitting in equity, to modify or vacate an injunction order originating in that court because of a change in the factual circumstances on the basis of which the injunction order was issued is hardly applicable to the facts of the present proceedings, whether or not the original injunction order of the District Court was affirmed by this Court.

As cross-petitioners have noted repeatedly, the injunction in this case did not originate in the District Court in which petitioners have sought to vacate it. It originated as the result of, and incidental to, a determination by this Court that a practice followed by the Board of Education of the City of New York (sending publicly-employed teachers and counselors into religious schools to teach and counsel students attending those schools) is in violation of the Constitution. Unlike an injunction issued by a District Court acting under its discretionary power to modify or vacate its own injunction, such a determination of

this Court is not only beyond the power of any lower court to change; it has also been, until the present, beyond the right or privilege of any party to seek to change in a proceeding brought in a District Court for that sole purpose, whether under Rule 60(b) or any other rule of law.

Additionally, the determination of this Court in *Aguilar* was not based on principles of equity, but on the principle of separation (or independence, as opposed to interdependence) of church and state embodied in the Establishment Clause of the First Amendment to the Constitution. The injunction mandated by that determination, therefore, is not subject to being vacated or modified by a change in factual "circumstances," as in the few cases cited by petitioners, especially if the change does not eliminate the practice prohibited by the Constitution.

Petitioners complain, to quote Agostini *et al.*, of being "stuck" with the determination in *Aguilar* until that determination might be vacated by this Court in a proper case. That, however, is the situation of any party affected adversely by a determination of this Court, even one as mighty as the Board of Education of the City of New York. In some instances, the only relief from a determination of this Court may lie in the long, slow process of constitutional amendment. In this instance, petitioners may only have to wait, as the City petitioners acknowledge, until *Helms v. Cody*, 856 F. Supp. 1102 (E.D. La. 1994), reaches this Court.

Petitioners may not even have to wait for *Helms v. Cody* to reach this Court. In their briefs in opposition, they ignore the procedure cross-petitioners and the Secretary have suggested to the Court by which the petitions would be denied, or perhaps withdrawn, without prejudice to reinstatement after a remand to the District Court for a plenary hearing which will bring the 11- or 12-year old record on appeal in *Aguilar* up to date

concerning facts pertinent to any proper reconsideration of this Court's prior determination in this case.

Lastly, petitioners try to minimize the precedent of their being allowed to misuse Rule 60(b) to take advantage of the comments of five Justices of this Court in *Board of Education of Kiryas Joel v. Grumet,* 114 S. Ct. 2481 (1994). The City petitioners argue only that cross-petitioners "raise false fears" because "[t]his is not an ordinary case, finally resolving a private dispute" (City Rep. Br., p. 3). Cross-petitioners submit that such an argument is meaningless and specious on its face.

The Agostini petitioners rely on the statement in this Court's opinion in *Standard Oil Co. v. United States,* 429 U.S. 17, 19 (1976), to the effect that the Court has "confidence in the ability of district courts to recognize frivolous rule 60(b) motions." With all due respect, cross-petitioners continue to wonder how, if petitioners are allowed to prevail on their motions, a District Court will distinguish between this case and any one in which there has been a vigorous four-vote dissent in this Court and a Justice has subsequently joined the Court whose views are known, or suspected, to favor the position of the dissenters.

III.

THE VERY RECENT PRONOUNCEMENTS OF THE SECRETARY ON SCHOOLWIDE PROGRAMS SERVE TO EMPHASIS THE LACK OF A PROPER RECORD FOR RECONSIDERATION OF *AGUILAR.*

In his brief in opposition to the cross-petition, the Secretary notes that, in April of this year, for the first time, he issued a "policy guidance" in which, contrary to the plain language of the pertinent provisions of the current Title I statute, he has advised that "schoolwide programs may not be operated in

private schools" (Sec. Br. in Opp., p. 2a). The stated premise is that "private schools are not eligible for Title I services" *(id.)*. The policy guidance is further complicated by the proviso that "eligible private school children residing in an area served by a schoolwide program school must be offered equitable services" *(Id.)*. Then, in July of this year, the Secretary promulgated a regulation which may be to the same effect, but is not worded in the same way as his policy guidance. C.F.R. § 200.12(b).

Cross-petitioners admit that we were not previously aware of these quite recent and quite remarkable pronouncements. Their recent issuance is explained by the fact that, although schoolwide programs have been in the Title I statute since 1978, it is only in the current school year of 1996-1997 that such programs were, for practical purposes, made widely available by the clause in the statute allowing them in schools in which as little as 50% of the students are from low-income families.

The content of the Secretary's recent pronouncements provide another reason why there should be no reconsideration of *Aguilar* without a more complete record. We reserve comment on the distinction that the Secretary draws between schoolwide services that benefit 100% of the students attending a "private" or religious school and other Title I services that benefit the lesser, but still substantial percentage of such students that qualify for Title I services. Such comment would be in response to those sections of the reply briefs which are not in opposition to the question raised in the cross-petition, and cross-petitioners have accordingly avoided responding to those sections.

CONCLUSION

The cross-petition for a writ of certiorari should be granted.

Respectfully submitted,

STANLEY GELLER
Counsel of Record
Attorney for Cross-Petitioners
750 Lexington Avenue
21st Floor
New York, New York 10022
(212) 486-4590